Filed 1/8/10 In re F.C. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re F.C. III et al., Minors.	
L.F., Petitioner and Respondent, v. F.C., JR., Objector and Appellant.	F057430 (Super. Ct. No. S-1501-AT-2291) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Petitioner and Respondent.

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INTRODUCTION

In September 2005, L.F. (mother) petitioned the superior court to free her children from the parental custody and control of their father, F.C., Jr. (father or FCJ).[1] In

[1] Because father and the older minor share the same given name and surname, when employing acronyms we will to father as "F.C.J." and older minor as F.C.3.

February 2006, the superior court granted mother's petition and father appealed. On February 21, 2007, this court filed an opinion reversing the superior court order for failure to appoint counsel for the minor children, defects in the court-appointed investigator's report, lingering questions about father's intent to abandon the children, and the court's possible misplaced reliance upon Family Code section 7825 (parent convicted of felony; right of action).[2] After the opinion was filed, father committed a residential burglary resulting in a four-year term in state prison. Upon our remand of the matter, Kern County Family Court Services prepared supplemental reports, the court conducted further proceedings, and father's parental rights were again terminated. He appeals and we affirm the orders terminating parental rights based on the trial court's finding of abandonment (§ 7822).

STATEMENT OF THE CASE[3]

On September 27, 2005, mother filed a petition in Kern County Superior Court to declare her minor children, F.C.3. (born in February 2002) and R.C. (born in July 2003), free from father's parental custody and control (§§ 7822, 7825).

On December 16, 2005, the court was advised that father was in custody on criminal charges and the court continued the matter to January 6, 2006. On the latter date, father appeared in open court, objected to the petition, and the court-appointed counsel on his behalf. On February 10, 2006, the court conducted a contested hearing on the petition and took the matter under submission. On April 4, 2006, the court filed a formal order declaring minors free from father's parental custody and control. On April 6, 2006, father filed a timely notice of appeal.

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[2] All further references are to the Family Code unless otherwise indicated.

[3] To assist the reader, we will briefly summarize the procedural history of the prior case (No. F050168) as set forth in our unpublished opinion filed February 21, 2007.

On February 21, 2007, this court filed an unpublished opinion reversing the orders declaring minors free from father's parental custody and control and remanding the matter to the trial court for further proceedings as appropriate. We specifically held: (1) the trial court had jurisdiction to terminate parental rights; (2) the trial court should have appointed independent counsel to represent the children's interests; (3) the report of Family Court Services Investigator Kristi E. Embry, MFT, did not adequately address the best interests of the children under Family Code section 7851; (4) upon further proceedings, the trial court was required to determine whether father left the children in the care and custody of their mother for one year without provision for their support or communication and with the intent to abandon them (§ 7822, subd. (a)(3)); and (5) the order terminating parental rights could not be based upon Family Code section 7825 (parent convicted of felony; right of action) because the statutory elements were not satisfied.

In May 2007, following remand, the trial court filed appointed counsel for the minors and referred the matter to Kern County Family Court Services (KCFCS) to prepare a supplemental report regarding the felony conviction of father. In August 2007, the court again referred the matter to KCFCS for preparation of a full supplemental report consistent with this court's opinion of February 21, 2007.

On March 11, 2008, investigator Embry filed her supplemental report with the trial court.

On September 12, 2008, the court conducted a hearing and father's counsel reported his client had sustained another felony conviction, had been sentenced to a four-year term in state prison, and had been placed in Wasco State Prison for assessment. On October 10, 2008, investigator Embry filed a supplemental report regarding father's July 25, 2008, conviction of first degree burglary (Pen. Code, § 460) and subsequent sentence to four years in state prison.

On October 31, 2008, the court conducted a contested hearing on the petition. On January 23, 2009, the trial court filed a detailed minute order granting the petition. The court ruled the criteria for termination of parental rights under Family Code sections 7822 and 7825 had been demonstrated by clear and convincing evidence.

On March 23, 2009, father filed a timely notice of appeal from the order declaring minors free from parental custody and control.

STATEMENT OF FACTS[4]

Factual History of Current Case No. F057430

1. Facts Elicited by Minors' Counsel

At the October 31, 2008, hearing on petition, attorney David Leon stated he was appointed as counsel for minors on May 10, 2007. He interviewed father on May 25, 2007, and the minors on August 21, 2007. He met with father again on January 29, 2008. Because minors moved with their mother to Oklahoma, counsel had no more contact with them after the 2007 interview. As to minors, counsel stated:

> "At the time I met with the children, [F.C.3.] was five, [R.C.] was four. [R.C.] didn't -- he was at an age -- he was very soft-spoken, was not very coherent, wasn't really able to communicate regarding his father. [F.C.3.], he was five at the time. His memories of his father were that he was a bad guy, that he lied. He did have a curiosity about him whether he wanted to see him again, but the memories he described were not good ones of his father. And, in fact, he called, I believe, [his stepfather] -- he called him his dad, that he was nice. That's the recollection I have with my conversations with [F.C.3.]."

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[4] We note the factual history of the prior case (No. F050168) may be found in our unpublished opinion filed February 21, 2007.

2. Facts Elicited from the March 11, 2008 supplemental report of the Family Court Services Investigator

Interview of Minors

Investigator Embry noted minors had been born in Bakersfield and were currently living with their mother and stepfather, J., in Oklahoma. F.C.3. was in kindergarten and R.C. was in pre-school. Embry interviewed both minors on January 2, 2008. They appeared to be happy and healthy, chattered and giggled, and were interested in looking at pictures and other items in Embry's office. They had a good relationship with each other and were able to follow directions.

The boys described the room they shared in their Oklahoma home, their favorite toys, and their enjoyment of a tree house. They said they received "time-outs" from mother and stepfather when they got into trouble. The minors described their drive from Oklahoma to California and said they had a good time at their grandmother's home on Christmas day.

The minors did not know why there were brought to Investigator Embry's office. They identified mother as their mother and both acknowledged she was a "good mom." They referred to stepfather as "[J.]" and knew he was not their birth father. According to Embry, it was unclear whether they understood the difference between a birth father and stepfather. When Embry asked about someone named "[F.C.J.]," R.C.--the younger minor--said he did not know anyone by that name. F.C.3.--the older minor--said he had a friend named [F.C.J.]. When asked if mother knew anyone by that name, F.C.3. said, "He used to be my daddy." F.C.3. referred to him as "[F.]" but R.C. said he did not remember him at all. Embry described the difference between a birth father and stepfather and identified father as their birth father and the concept of parental rights. R.C. did not appear to have any understanding of what Embry was describing. F.C.3. said he did not remember the last time he saw his father but did say he would "like to watch TV with him." According to Embry, the children did not appear to have any real

understanding of the petition or the concept of terminating parental rights. In Embry's view, the minors did not report any real memories of their father. They said they loved their mother and "like [J.]" very much. F.C.3. said he wanted his last name to be changed to [J.'s] surname.

At the time of investigator Embry's report, father lived at Legacy, a sober-living facility in which he participated in drug counseling and Narcotics Anonymous meetings. Embry noted he was actively seeking employment. He claimed he could leave the program at any time once he re-established himself. During Embry's January 16, 2008, interview, father said he completed the Wes-Tech program that certified him to work in oilfield positions and had a job interview set for the following day. Father showed Embry cards verifying his completion of the program and eligibility for oilfield employment.

Embry detailed father's lengthy criminal record. In September 2004, he was arrested for threatening a crime with intent to terrorize (Pen. Code, § 422) and battery on a person (Pen. Code, § 243, subd. (a)). The complaint was amended to include false imprisonment of an elder/dependent adult (Pen. Code, § 236), to which father pleaded no contest and received a sentence of one year in county jail and three years of formal probation.

In October 2005, father was arrested for possession of a stolen vehicle (Pen. Code, § 496d, subd. (a)), possession of a stolen vehicle (Veh. Code, § 10851, subd. (a)), taking a vehicle without an owner's consent (Veh. Code, § 2800.2, subd. (a)), evading a police officer (Pen. Code, § 496), possession of burglary tools (Pen. Code, § 466), and a violation of probation (Pen. Code, § 1203.2, subd. (a)). On February 17, 2006, father was convicted of felony evasion of a peace officer, sentenced to two years in prison, given a fine, and ordered to pay restitution.

In January 2007, father was arrested for possession of controlled substance paraphernalia (Health & Saf. Code, § 11364). He was convicted and sentenced to three

years' probation conditioned upon service of 24 days in jail and payment of a fine. A printout from the California Law Enforcement Telecommunications System (CLETS) noted incidents on December 19, 2006, April 16, 2007, May 10, 2007, July 18, 2007, and August 13, 2007. The last entry cited a felony violation of parole with the notation "to finish term."

Interview of Father

At the February 10, 2006, contested hearing leading to the prior appeal, mother testified father showed up at R.C.'s birthday party in 2004 and pulled a knife on mother's then-boyfriend. The police were called to the scene and father fled. Officers prepared an incident report but the county took no action against father. Investigator Embry interviewed father about this incident on January 16, 2008. With respect to R.C.'s first birthday party, father said he did go to the party to drop off a gift but mother's then-boyfriend said he could not do so. According to father, the boyfriend initiated a fight and father fought back in an effort to defend himself. He said mother struck him when she attempted to intervene between father and the boyfriend. He also said mother threatened to call the police and he left in response to her threat. According to father, nothing more came of the incident.

On July 19, 2004, mother obtained a restraining order against father. She alleged in her petition:

> "[Father] threatened to kill me, our children, his family, my family and a friend I was with, he then stated he would commit suicide. Respondent attempted to run me off the road with his car. Respondent also called and left (27) threatening messages. All of this occurred on May 9, 2004."

The order required father to stay at least 100 yards from mother and the children and prohibited him from contacting them by telephone, mail, and e-mail. The order, which was scheduled to expire at midnight on June 17, 2007, did not provide for visitation between father and the children.

Father said he sent cards and letters to the children while he was incarcerated, but did not know if minors received them because he did not receive any kind of response, except for the return of one letter. According to father, on one occasion, mother threatened to call his parole officer about his attempts to contact the children. Father claimed he was just trying to make contact with his former mother-in-law to inform her he had some money to give to mother. According to father, mother called the parole officer and that resulted in him being arrested.[5]

Embry asked father why he did not complete the paperwork to gain visits with his children, noting father's probation officer had offered to supervise such visits. Father said he was arrested and then incarcerated and so was unable to finish the paperwork. Embry noted that in this court's prior opinion, father gave two different reasons for not completing his paperwork. Embry further noted the reason he gave at the January 16, 2008, interview was different from the reasons cited in the opinion. Embry asked father why he waited until 2008 to look into filing for visits rather than doing it in 2007, when the appeal was filed. Father said that mother's restraining order did not expire until June 2007 and he thought filing paperwork would "stir up trouble."

Investigator's Supplemental Report

In October 2008, Embry prepared another supplemental report and noted that father was currently incarcerated at Wasco State Prison following his May 16, 2008, arrest for first degree robbery of an inhabited dwelling (Pen. Code, § 213, subd. (a)(1)(A)), first degree burglary (Pen. Code, § 460, subd. (a)), and false imprisonment with violence (Pen. Code, § 236). On July 25, 2008, father pleaded no contest to the

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[5] Father did not provide precise details about the restraining order. Mother said she obtained a three-year domestic violence order restraining father from coming within 100 yards of mother or the children and prohibiting him from contacting mother or the children.

burglary count on condition that he serve no more than four years in state prison and the other two counts were dismissed in furtherance of justice. Father was sentenced to four years in prison on September 25, 2008.

Embry reviewed the parties' family law file and found a March 19, 2007, order to show cause to modify visits and a request for temporary orders to have visits supervised by Child Protective Services (CPS). Judge Fielder denied the latter request and neither party appeared for mediation on April 19, 2007, or for court on April 23, 2007, although mother's counsel appeared on her behalf. The matter was dropped for lack of service.

Interview with Mother

Embry first interviewed mother on November 9, 2005, and again on January 2, 2008. Mother had earned an Associate of Arts degree in California and was currently residing in Oklahoma with her family. She was a full-time student at the University of Oklahoma and operated a daycare in her home. A records check on mother did not reveal any history of arrests or any involvement with CPS. Mother was married to father from 2002 to 2004 and had been married to [J.] since February 17, 2007. They were expecting their first child together in June 2008.

With respect to Family Code section 7822, Mediator Embry recommended that minors be freed from father's custody and control. Embry observed:

> "It appears to this investigator that [father's] choices to engage in drug use and criminal behavior prevented him from having a relationship with his children for a significant amount of time. He knowingly committed various illegal acts, the punishment for which would leave him in a position of not being able to see his children. He made such decisions on more than one occasion.
>
> "[Father] contends he made efforts to contact the children but was denied contact by the mother and essentially the court in its granting of her restraining order protecting both her and the children. As mentioned earlier, it is my opinion that this is an unfortunate case. With the lack of contact between [father] and the children, particularly at this young stage of their lives, the children have not formed a relationship with [father], nor do

> they appear to have any independent memories of him. The law requires a comment regarding the best interest of the children when considering whether or not to terminate parental rights. At this point in their lives, [minors] have formed a relationship with [J.], who they claimed to this investigator they like very much. [J.] has acted in the capacity of the children's father for a year now and, according to [mother], wishes to adopt them. In addition, they have established a life with friends and school in Oklahoma. It is not clear to this investigator that to introduce [father] into their lives would be in their best interest."

3. Facts Elicited at the October 31, 2008, Contested Hearing

Mother's Testimony

Mother testified she and father married on June 10, 2002, and lived together for only seven or eight months of the two years of their marriage. After they separated in May of 2003, she tried to arrange supervised visitations between father and the minors, with her parents as the supervisors. However, when mother stopped attending the visitations, father also stopped going. When mother's parents tried to take the minors to a park for visitations with father, the latter would not show up.

Mother believed father needed supervised visitations because he was on drugs. When they lived together in an apartment, he punched holes in the walls of the apartment, wrecked all of his cars, and was twice incarcerated for 30-day terms due to drug-related offenses. After mother arranged the supervised visitations, father began getting violent. He frequently tried to run mother off the road while she was driving. He also drove past her friends' house and called her a whore.

After mother obtained the divorce, her former mother-in-law called her and said father was threatening to kill mother and the minors. Mother obtained a restraining order against father on June 17, 2004. After the restraining order issued, father did not request any visitation. However, he showed up at R.C.'s one-year-old birthday party in July 2004 and pulled a knife on mother's boyfriend. The police were called and father fled from the scene. Mother said this was the last attempt of father to exercise contact with his children, although he did make telephone calls to her and send the children some mail

from prison. His last visitation with the minors was in the summer of 2004. Since their divorce, father had not paid any child support, bought the children clothes or Christmas presents, or sent mother or the children any money. Moreover, he did not give mother any money after their separation in May 2003.

After mother left father in 2004, she moved back in with her parents for two years. Mother remarried, lived with her new husband in Bakersfield for about six months in 2006, and then moved with her new husband and the minors to Oklahoma in January 2007. She said it was her new husband's intention to adopt the minors if the superior court granted a termination of father's parental rights.

With respect to visitation, mother emphasized that father would only participate in supervised visitation if she were present. Mother said father would call her parents to determine whether or not she would be present. If the parents told father that mother would be there, he would show up for the visitation. If the parents told father that mother would not be there, he would not show up. He participated in three visitations when she was present. She stopped attending because father was running her off of the road and threatening to kill her.[6] Father did not attend any visitations after she stopped participating. Moreover, she said he had not attempted to exercise a single visitation since R.C.'s one-year-old birthday party. His only contact had been letters from jail.

On cross-examination, mother said she had obtained a domestic violence restraining order prohibiting father from coming within 100 yards of her or the children. The restraining order was issued on June 17, 2004, and father did not show up in court for the proceeding. The order expired after three years and she did not renew it. After

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6 With respect to vehicular behavior, mother said father tried to run her off of the road on five or six occasions. These incidents took place right after their divorce and on several of those occasions she had friends in her car.

she initiated a termination of his parental rights for abandonment, she learned he had attempted to serve a modification of the visitation order upon her.

Mother did not notify father of her move to Oklahoma because she was told she did not have to do so. Mother said father did not get violent with the children during supervised visits. However, he used to punch holes in the wall and spit in front of young F.C.3. He also tried to grab F.C.3. and run off with him on one occasion. Mother acknowledged father was under the influence of methamphetamine when that occurred and that he had used drugs the whole time they were married, approximately one and half years. She also said he had used drugs in high school but denied being a user herself.

Mother did not know whether father contacted her parents for visitation with the minors. He did not visit with the children when she and the minors were residing in her parents' home. Mother said she did not refuse father's attempts to make support payments. At one point, her parents advised father he could mail the support payments but father said he wanted to spend the money on the children on his own. Mother said she was scared of father and did not want him around her.

Mother said the supervised visitation was a "mutual decision" and not carried out by court order. The only time the court made orders was in dissolving her marriage to father and in issuing the restraining order against him. The dissolution gave mother full custody of the children and mother noted that father failed to show up in court for the dissolution hearing. Father had visitation at her discretion and she never refused him. At first, she took the children to the visitations and then she stopped going because she was scared of father. Her parents then tried to take the minors but father would not show up.

Mother said minor R.C. was six months old when father left and minor F.C.3. was two years old. According to mother, R.C. and F.C.3. do not ask about their natural father. Mother said J. was attending flight school and scheduled to graduate within six months of the hearing date. She said he was training to be a pilot and also worked at the flight school he was attending. Their plans were for J. to teach until he acquired sufficient

hours to be hired by an airline. She planned to continue working and to finish school in the spring of 2009. Minors were currently enrolled in school.

Mother said she learned father sent some letters for the minors to her parent's home when he was in prison. Most of the letters arrived after she filed the petition to terminate his parental rights in 2005. Two arrived prior to the filing of the petition.

Father's Testimony

Father confirmed he had two children with mother, F.C.3. and R.C. He acknowledged separating from mother in May 2004 but did not have the details of their dissolution. He could not recall the dates they resided in their apartment. He claimed "[w]e were going off and on" and said he could not remember the dates.

Father claimed he exercised visitation with the minors even when mother was not present. He recalled three visitations in the summer of 2004, the last visitation in a park in June 2004. Mother's mother was present on one visitation and both of mother's parents were present on the other two visitations. After those visitations, father claimed he would call and ask for visitation and "her parents would say it would be up to her [mother], and then she would tell her parents no."

He admitted he did not complete paperwork for court-ordered visitation. However, he unsuccessfully attempted to get the restraining order modified on a number of occasions. Father said he was released from incarceration on May 16, 2005, and called mother for about an hour to work out some sort of visitation agreement. Father said she denied his request and father moved to Tehachapi to work as a painter.

Father said he was arrested only one time during the time he lived with mother and claimed he was released the day following his incarceration. Upon further questioning, father admitted a number of offenses: a June 15, 2004, conviction for theft or extortion involving a motor vehicle; a September 2003 charge of public drunkenness; two counts of driving without a license; making a terrorist threat; an October 15, 2004, conviction of false imprisonment with violence; and a November 14, 2005, conviction of felony

reckless evading. Upon the 2005 conviction, father was sentenced to two years and was then paroled to his uncle's house in Tehachapi.

In February 2007, father was picked up on a paraphernalia possession charge and admitted to Kennemer Center halfway house. In July 25, 2008, he pleaded to a burglary charge with a middle term of imprisonment of four years. During a three-month period between his times in custody, father worked for the TempServe agency but did not send any money to his children because it would violate the "no contact" terms of his parole. He noted that his parole office did not send money to parolees' children. Between May and August 2005, father worked as a painter for his uncle's friend, Gavin. He did not send any support money from the painting job to mother because Gavin did not pay him. Later in his testimony, father said he supported himself in Tehachapi by doing side jobs for his uncle in exchange for shelter.

As to his contacts with minors, father said he sent numerous letters to his children and had gotten a few of them back. Father claimed he did not actually pull a knife at R.C.'s one-year-old birthday party. Father said the knife was in a case and the unstrapped case fell out his belt loop onto the ground. Father said he picked up the knife and put it back in the case but did not chase mother's boyfriend. Father said his purpose in visiting the party was to tell his son happy birthday and to drop off his gift. Father admitted fleeing the party because he did not want to cause "any big scene." Father remembered handing the present to mother and her brother coming outside with a baseball bat.

On one occasion, father wrote mother a letter, explained he tried to send her money, but said his mother advised him not to do so. In another letter, father said his boss was holding $3,600 for him. Father said he never instructed anyone to give money to mother for the children because he did not trust anyone in that type of situation. He said he did not even trust his own family in such a situation.

Father admitted using drugs from 2002 through all his times in and out of jail. He said he purchased but did not sell narcotics. He used money from side jobs and under-the-table work to fund his purchases. Father admitted he did not send such money to his children.

Father wrote a letter to mother on February 24, 2006. In the letter, father said he was worried about his brother because the latter "flipped out on my mom worse than I did on you. I'm sorry. I honestly don't remember threatening you and the boys because of the drugs." In one garbled portion of the letter, father said he meant to write, "I don't remember pulling the knife on Corbin [mother's boyfriend at the time of R.C.'s first birthday party]." On cross-examination, father admitted the letter also said, "He had it coming." When asked about that statement, father claimed the latter reference was to an unspecified fistfight and not the alleged pulling of a knife.

Father believed he stopped living with the minors in June 2004, but said his memory was confused because he had done a lot of drugs and had sustained some brain damage. Father admitted using methamphetamine, marijuana, and cocaine on a regular basis at the time he separated from mother. He also said he had been doing drugs since he was 13. Father admitted he never held a solid job during the time of his marriage. Most of his work experience had involved farm labor, general labor, and landscaping. He lived off-and-on with mother and admitted, "[I]t was never consistent." Father lived with mother's parents a bit, with his grandmother at times, and with mother in an apartment for a little bit. When father lived with his grandmother, mother and the minors would come over and stay a night or two once in awhile.

Father said his wife obtained a restraining order in July 2004, about the time of R.C.'s first birthday party. Father said he did not remember the order and was never served with one. After the birthday party incident, father's grandmother handed him a copy of the restraining order she had received in the mail. Father acknowledged the order prohibited him from contacting his sons and ex-wife. However, he did try to contact

them numerous times in violation of the order "[s]o I could see my kids." Father said he was arrested in 2006 for violating the restraining order.

At the time of the October 31, 2008, hearing on petition, father was 26 years old. He said he was age 21 when he and mother separated and admitted he had been incarcerated "95 percent of the time" during the intervening five years. Father claimed he earned money while incarcerated and tried to send his prison trust funds but the monies never went out. Father acknowledged he had worked for about six months on two jobs during the five years preceding the hearing.

When father was paroled in 2006, he called his ex-in-laws and left a message that he had money for Christmas and child support. He asked his former in-laws to call father's aunt back for instructions on getting the money to mother and the minors. After doing so, father's parole officer summoned and rearrested him for attempting to contact mother and minors. Father admitted a condition of his parole forbade such contacts.

Father acknowledged he was going to be incarcerated until 2010. To change his lifestyle, father was taking courses in anger management, parenting, family support services, and substance abuse. Father explained the family service program was a new program that allowed an inmate to have more involvement with his or her family in the prison system. Father said his schooling was only through the 11th grade and said he was taking classes in preparation for the GED examination. As for future plans, father said he wanted to be paroled to Nevada and to get a college education. He also expressed interest in completing a fire prevention course in California.

Father said he never intended to abandon his children, felt that he had not been given an opportunity to visit with his children, and blamed mother and himself for that situation. Father said he felt responsible for past incidents that entailed allegations of violence. Father admitted he always had a temper and was just learning to cope with it. However, he claimed he never acted angrily toward his children or acted violently in their presence, although he admitted having arguments in their presence. Father nevertheless

maintained he should be given another chance, even though the children claimed they did not know him. Father acknowledged he had been away for a long time and they were babies when he left.

With respect to modification of the restraining order, father said he made one attempt and claimed that his probation officer was going to assist him. However, father did not complete the modification process because he found a job. He also made modification attempts when he was in the Kennemer Center in February 2007 and "this last time I was out in October." Father admitted both attempts took place after mother filed the petition to terminate his parental rights.

Father discussed two letters he wrote from jail. The first letter was addressed to his grandmother. Father said he stayed away from everyone because he wanted more respect than disrespect. Father claimed that language reflected he was "pretty strung out on drugs" rather than his view of the restraining order. The second letter was dated March 3, 2005, when father was in prison. Father's letter said it would just be better if he stayed away. Father explained he meant staying away "… for now. Not forever." Father said he knew he had a problem at the time he wrote those particular letters. Father explained, "I said for now. Not forever, stating – pretty much stating the fact that I have a drug problem and I would rather, you know, not have my kids see that problem." Father said he did not want his behavior to corrupt the minors.

Ruling of the Trial Court Following Remand

On January 23, 2009, the trial court granted the petition freeing minors from the custody and control of father pursuant to Family Code sections 7822 and 7825.

As to Family Code section 7822, the court noted in relevant part:

> "The court finds that [father's] unfortunate lack of credibility on these, as well as some other subjects, makes it difficult to credit his testimony that he did make efforts to see the boys, did intend to support them but was unable to afford to, and did not intend to abandon them during the course of his chaotic lifestyle, which was marked by drug use, absconding from law

enforcement, and frequent periods of imprisonment. It was apparent from the evidence presented at the hearing that his primary motivation in maintaining even minimal contact after the divorce was to try to control or 'win back' [mother], rather than to foster a positive paternal relationship with the minors.

"The supplemental report of family court services dated March 21, 2008, and the recommendation of minor's counsel were both that the termination of parental rights is in the best interest of the minors; it is clear to the court that they have little memory (in [R.C's] case none) of [father], and a far more stable and beneficial life without the disruption that would be caused by sporadic reappearances during his brief releases from incarceration.

"The court therefore finds that the criteria for termination of parental rights under Family Code section 7822 have been demonstrated by clear and convincing evidence."

As to Family Code section 7825, the court concluded:

"By his own estimate, [father] has spent '95%' of his time' incarcerated over the past five years.

"The court finds that the violent facts of his present conviction (involving the use of a weapon to take property from the victim inside a dwelling), when evaluated in the light of his near-constant incarceration for crimes involving violence, weapons, and narcotics abuse, are sufficient to demonstrate by clear and convincing evidence that he has engaged in a pattern of criminal behavior detrimental to the welfare of his two young children, and is thus not a fit parent for them. There is thus a sufficient independent basis for termination of his parental rights under Family Code section 7825."[7]

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[7] The court further noted that father was sentenced to four years in prison after a September 25, 2008, plea to residential burglary. The plea resulted from an arrest for residential robbery and false imprisonment on May 16, 2008, during the pendency of this proceeding for termination of parental rights. The court noted father provided a "less than persuasive version of the facts" in the instant proceeding, denying any criminal involvement despite his plea. The court noted that father had served two years in prison for violating Vehicle Code section 2800.2 in 2006 and one year in county jail for a felony violation of Penal Code section 236 in 2004. The court observed that father served a number of lesser jail sentences for various misdemeanor convictions entailing violence and narcotics, as well as for probation violations.

DISCUSSION

I. DID SUBSTANTIAL EVIDENCE SUPPORT THE FINDING THAT TERMINATION OF PARENTAL RIGHTS WAS IN THE BEST INTERESTS OF THE CHILDREN?

In our prior opinion, we held Investigator Embry's report did not adequately address or enlighten the trier of fact as to the best interest of the children. We reversed and remanded the order of termination with instructions to refer the matter to the Kern County Office of Family Court Services for "further investigation and the preparation of a report consistent with Family Code section 7851" and case authorities interpreting that statute.

In this second appeal, father contends the combined efforts of minors' counsel and Investigator Embry failed to enlighten the court on the issue of the best interests of the children.[8] He maintains Embry's report suggested that the older minor, F.C., did recall his father and had pleasant memories of the father.

Although father's contention is couched in terms of "substantial evidence," he is actually challenging the adequacy of Investigator Embry's supplemental reports and the adequacy of attorney Leon's representation of minors.

Adequacy of the Supplemental Reports

Family Code section 7851 states in relevant part:

> "(a) The juvenile probation officer, qualified court investigator, licensed clinical social worker, licensed marriage and family therapist, or the county department shall render to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best interest of the child.
>
> "(b) The report shall include all of the following:

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[8] Father attempts to magnify the alleged error by tying the conduct of Investigator Embry to the conduct of attorney Leon. We will separately examine the conduct of Embry and Leon.

> "(1) A statement that the person making the report explained to the child the nature of the proceeding to end parental custody and control.
>
> "(2) A statement of the child's feelings and thoughts concerning the pending proceeding.
>
> "(3) A statement of the child's attitude towards the child's parent or parents and particularly whether or not the child would prefer living with his or her parent or parents.
>
> "(4) A statement that the child was informed of the child's right to attend the hearing on the petition and the child's feelings concerning attending the hearing.
>
> "(c) If the age, or the physical, emotional, or other condition of the child precludes the child's meaningful response to the explanations, inquiries, and information required by subdivision (b), a description of the condition shall satisfy the requirement of that subdivision.
>
> "(d) The court shall receive the report in evidence and shall read and consider its contents in rendering the court's judgment."

Father initially contends that Embry's supplemental reports of March 10, 2008, and October 31, 2008, were inadequate because they did not adequately address or enlighten the trier of fact as to the best interest of the children. We have independently summarized the content of those reports in the statement of facts above and noted Embry's conclusion: "It is not clear to this investigator that to introduce [father] into their lives would be in their best interest." Father points out that F.C. did remember him—his natural father—as "[F.]," not "[F.C.J.]," and that F.C.3. liked watching television with [F.C.J.]. Father contends Embry dismissed that recollection as insignificant because Embry observed that F.C.3.'s statement "sounded like something a child would say."

Due process of law requires that each party (a) receive a copy of the report; (b) have an opportunity to cross-examine the investigative officer and to subpoena and examine persons whose hearsay statements are included in the report; and (c) be allowed to introduce rebuttal evidence. (*In re George G.* (1977) 68 Cal.App.3d 146, 156-157.) Father enjoyed each of these rights in connection with the contested October 31, 2008,

hearing in the instant case. Embry reported her interview with F.C.J. within the parameters of Family Code section 7851 and it was the trial court's obligation to read and consider the contents of that report in the first instance. (*Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 168-169.) The trial court did so. Father's claim of a deficient report is belied by the extensive summary offered above.

Father further claims Embry's conclusion and recommendation in the March 11, 2008, report were improperly based upon his criminal convictions. Embry indeed reviewed father's extensive criminal history. However, her analysis was more than simply a laundry list of his past offenses and her recommendation focused more upon "his choices to engage in drug use and criminal behavior prevent[ing] him from having a relationship with his children for a significant amount of time." In other words, the greater focus was upon abandonment under section 7822. To that end, Embry noted there had been a lack of contact between father and minors at a young stage of their lives, the children had not formed a relationship with father, and they did not appear to have any independent memories of him.

In her report filed October 10, 2008, Embry described father's most recent felony conviction and sentence. While she cited section 7825, she did not expressly recommend termination on that statutory basis. Rather, she maintained the most recent felony "call[ed] into question his fitness to have any future custody and control of his minor children." To that end, she noted the 2008 offense was a crime against another person that involved a threat to the victim's life. She also noted that father's poor choices once again led to his inability to have contact with his children, thus suggesting abandonment under section 7822. Father's claim that Embry's recommendation was improperly based upon the 2008 conviction is simply wrong and must be rejected.

Alleged Ineffective Assistance of Counsel

Father further claims minor's counsel was ineffective because F.C.3. offered "very different" memories of father in his August 21, 2007, interview with attorney Leon and in

his January 2008 interview with Investigator Embry. Father points out that F.C.3. told Leon that his natural father "was a bad guy, that he lied." F.C.3. nevertheless expressed to Leon a curiosity about seeing father again but Leon concluded the memories the minor described were not good ones. In her March 11, 2008, report, Embry said she had interviewed F.C.3. in January 2008. F.C.3. referred to his natural father as "[F.]" not "[F.C.J.]," did not remember the last time he saw father, but did state "he would 'like to watch TV with him.'"

On appeal, father characterizes F.C.3.'s memories in the two interviews as "very different" and maintains counsel was ineffective by not communicating with his minor client for a year (between the August 21, 2007, interview and October 31, 2008, hearing) and by not making a greater attempt to elicit F.C.3.'s positive memories of father. Counsel for a minor must take into consideration the child's wishes when determining what the child's best interests are. This does not mean that, after independent consultation and reflection, counsel for minor is prohibited from urging that a child's best interests would be fostered by a termination of parental rights, even if this is contrary to the child's stated desires. (*In re Mary M.* (1986) 180 Cal.App.3d 1058, 1066.)

To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) When an ineffective assistance claim can be resolved solely on lack of prejudice, a reviewing court need not determine whether counsel's performance was objectively deficient. (*In re Jackson* (1992) 3 Cal.4th 578, 604, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

No prejudice occurred in the instant case. Attorney Leon described his August 21, 2007, interview with minor F.C.3. in detail. The fact that then-five-year-old F.C.3.

offered certain memories in 2007 and a few additional details in January 2008, did not mean that counsel was ineffective in conducting the earlier interview. Father's implicit suggestion that counsel should have conducted a more probing and searching interview of the older minor--or should have conducted repeated interviews and pressed the minor for information favorable to father--is not supported by a citation to case authority. Moreover, the fact that F.C.3. had a curiosity about father in 2007 was entirely consistent with minor's 2008 recollection that he "like[d] to watch TV with him," negative comments about father notwithstanding.

Father's claim of ineffective assistance of minors' counsel must be rejected.

II. DID SUBSTANTIAL EVIDENCE SUPPORT THE FINDING THAT APPELLANT ABANDONED HIS CHILDREN?

In our prior opinion, we instructed the trial court to determine whether father actually deserted his children with an intention to entirely sever the parental relation. We specifically advised the trial court to consider "whether father 'left' the children in the care and custody of mother for a period of one year without provision for their support or communication and with the intent to abandon the children. (§ 7822, subd. (a).)"

On appeal after remand, father contends the finding that he abandoned his children was not supported by substantial evidence. He specifically argues he never "left" his children, his efforts did not constitute parental inaction amounting to "leaving," his financial circumstances coupled with no demand for support did not establish the lack of provision for support during the statutory period, and he did not fail to communicate because a restraining order precluded contact.

Family Code section 7800 states:

> "The purpose of this part is to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life."

Family Code section 7822 states in relevant part:

"(a) A proceeding under this part may be brought if any of the following occur: [¶] . . . [¶]

"(3) One parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child."

As noted in our prior opinion, mother's petition alleged:

"7. On or about October 14, 2004, [father] pled Nolo Contendere and was convicted of Penal Code Section 236, False Imprisonment with Violence, etc., a felony, and sentenced to prison for one (1) year. He also has multiple other arrests on his record. By reason of the above conviction and criminal history, [father] is unfit to have the future custody and control of his minor children ....

"8. It is in the best interests of the children that the parental rights of [father] be terminated due to the following: (a) because the biological father has accepted no responsibility with regard to the children nor indicated that he is willing or able to provide a suitable home for the children; (b) [father] is a convicted felon and the facts of the crime are of a nature that prove his unfitness as a parent to have future custody of [the minor children]."

Sections 7800, 7820, 7822, and 7825 are all found in part 4 of division 12 of the Family Code. Section 7822, found in chapter 2, authorizes the termination of parental rights when a child has been left by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support or without communication from the parent and with the intent to abandon the child. (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 883 [construing predecessor section].)

Under Family Code section 7822, a court may declare a child free from a parent's custody and control if the parent has abandoned the child. Abandonment occurs when a parent has left the child in the care and custody of the other parent for a period one year without any provision for the child's support or without communication from the parent, with the intent on the part of the parent to abandon the child. A Family Code section 7822 proceeding is appropriate where three main elements are met: (1) the child must have been left with another, (2) without provision of support or without communication

from his parent for a period of one year; and (3) all of such acts are subject to the qualification that they must have been done with the intent on the part of such parent to abandon the child. The failure to provide support or failure to communicate is presumptive evidence of the intent to abandon. If the parent has made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent. (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010; Fam. Code, § 7822, subd. (b).)

As we noted in our prior opinion, to constitute an abandonment, there must be an actual desertion, accompanied with an intention to entirely sever, as far as it is possible to do so, the parental relation and throw off all obligations growing out of the same. Family Code section 7822 contemplates that abandonment is established only when there is a physical act--leaving the child for the prescribed period of time--combined with an intent to abandon, which may be presumed from a lack of communication or support. (*In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 754.) The parent need not intend to abandon the child permanently. Rather, it is sufficient that the parent had the intent to abandon the child during the statutory period. (*In re Amy A.* (2005) 132 Cal.App.4th 63, 68.) Intent to abandon may be found on the basis of an objective measurement of conduct, as opposed to stated desire. In determining a parent's intent to abandon, the trial court may consider not only the number and frequency of his or her efforts to communicate with the children, but the genuineness of effort under all the circumstances, as well as the quality of the communication that occurs. (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.)

Abandonment and intent are questions of fact for the trial judge. (*Adoption of Allison C., supra,* 164 Cal.App.4th at p. 1011.) We apply a substantial evidence standard of review to the trial court's findings, keeping in mind that in a Family Code section 7822 proceeding, all of the trial court's findings must be made by clear and convincing evidence. (*In re Amy A., supra,* 132 Cal.App.4th at p. 67; § 7821.) In reviewing the evidence, an appellate court must resolve all conflicts in favor of the respondent and

indulge all legitimate and reasonable inferences to uphold the judgment or order if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. This rule is as applicable in reviewing the findings of a judge as it is when considering the verdict of a jury. Thus, the question before this court turns upon whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court's conclusion that the weight of the evidence supports the finding. (*Hall v. Bureau of Employment Agencies* (1976) 64 Cal.App.3d 482, 495.)

In the instant case, father essentially asks this court to reweigh the evidence and substitute our deductions for those of the trial court. This we may not do. The credibility of witnesses and the probative value of their testimony are questions for the trier of fact. (*Rose v. Melody Lane of Wilshire* (1952) 39 Cal.2d 481, 487.) The power to weigh the evidence and resolve issues of credibility is vested in the trial court and not the reviewing court. (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719.) The trial court expressly found that father lacked credibility on a number of subjects "making it difficult to credit his testimony that he did make efforts to see the [children], did intend to support them but was unable to afford to, and did not intend to abandon them during the course of his chaotic lifestyle, which was marked by drug use, absconding from law enforcement, and frequent periods of imprisonment." In the trial court's view, father's primary motivation in maintaining even minimal contact after the marital dissolution was to try to control or "win back" mother rather than foster a positive paternal relationship with the minors.

Mother testified that she and father shared an apartment for seven or eight months after they were married but he did not really reside with her during that time. After they physically separated in May 2003, father did not give mother any money. After the separation, mother tried to have supervised visitations between father and minors but he stopped attending when she stopped attending. Father did not exercise a single visitation after she stopped attending, even though she never refused visitation. Father did not visit

minors at mother's parents' home when she was absent. The marital dissolution proceeding gave mother full custody of the children.[9] Father's last visit with the minors was at R.C.'s first birthday party in July 2004. When asked whether father made phone calls to the minors, mother said father's calls were "usually to talk to me." She acknowledged he did send some mail to the minors from prison but most of the correspondence arrived after mother filed the petition for termination of father's parental rights based upon abandonment. Moreover, since the summer of 2004 he had not paid any child support, purchased clothes for the minors, bought them Christmas presents, or sent any money to mother or to the minors. Although mother admitted moving to Oklahoma with minors and their stepfather, J., a parent may be found to have "left" a child in another person's care and custody within the meaning of section 7822 even when the child moves away with the other parent. (*In re Amy A., supra,* 132 Cal.App.4th at p. 69.)

Father repeatedly insists any parental inaction on his part did not constitute "leaving" the children. However, this assertion--along with similar assertions relating to support, intent to abandon, and communication--is totally dependent upon father's testimony. The trial court expressly discredited such testimony, despite father's ready answers to a host of questions about his premarital, marital, and post marital behavior. An appellant has the burden of showing the finding or order is not supported by substantial evidence. (*Adoption of Allison C., supra,* 164 Cal.App.4th at p. 1011.) An appellate court views the record in the light most favorable to the prevailing party and resolves all evidentiary conflicts and indulges all reasonable inferences in support of the

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9 A father's repeated inaction in the face of an order awarding custody of a minor to a mother can provide substantial evidence that he voluntarily surrendered his parental role and thus "left" the minor within the meaning of section 7822. (*In re Amy A., supra,* 132 Cal.App.4th 63, 70.)

judgment or order. (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 454.) On appeal, all evidence most favorable to respondents must be accepted as true and that which is unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. (*In re Gano* (1958) 160 Cal.App.2d 700, 705.)

We have independently summarized such evidence in great detail in the statement of facts above. We will not repeat that summary here, except to say that the testimony of mother and testimony and reports of investigator Embry provided sufficient bases for termination of father's parental rights based upon abandonment under Family Code section 7822 by clear and convincing evidence.[10]

DISPOSITION

The January 23, 2009, findings and order freeing minors from the custody and control of father pursuant to Family Code section 7822 is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Dawson, Acting P.J.

_____
Hill, J.

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10 Father also contends the order terminating his parental rights cannot stand to the extent it relies upon Family Code section 7825. He specifically contends the facts underlying his present conviction do not meet the requirements of Family Code section 7825. In view of our holding in Issue II above, we need not address this issue.